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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1526

GREGORY R. GOLZ,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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TABLE OF CONTENTS

page

OPINION BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING WRIT:

I

IT IS A DENIAL OF DUE PROCESS OF LAW, BECAUSE OF ITS FUNDAMENTAL UNFAIRNESS, TO TRY A PERSON FOR VIOLATION OF PROBATION FOR THE COMMISSION OF A LATER OFFENSE, TO REVOKE PROBATION AND SENTENCE THAT PERSON TO THE PENITENTIARY ON THE PROBATIONARY OFFENSE, BEFORE A TRIAL ON THE INDICTMENT FOR THE LATER OFFENSE.....7

CONCLUSION 14

APPENDICES 15-23

Ills. Rev. Stats. 1974, Ch. 38 Par 117-3(c), now, Par 1005-6-4(c) 7

Ashe v. Swenson, 397 U.S. 436, 442 9

Gagnon v. Scarpelli, 411 U.S. 778, 786 11

Molitor v. Kaneland, 18 Ill. 2d 11, 25 14

In re Murchison, 349 U. S. 133, 136 13

In re Oliver, 333 U. S. 257, 278 13

People v. Crowell, 53 Ill. 2d 451; 292 NE 2d 721 (1973) 7

People v. Grayson, 58 Ill. 2d 260, 265; 319 N.E.2d 43 (1974) 9

People v. Warne, 39 Ill. App. 3d 894, 897; 350 NE 2d 836 (1976) 9

People v. Whitt, 16 Ill. App. 3d 824, 828 12

In re Winship, 397 U. S. 358 9

IN THE

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STATE OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

The Petitioner, GREGORY R. GOLZ, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Apprellate Court for the Second Judicial District.

The Supreme Court of Illinois denied a Petition for Leave to appeal from it.

OPINION BELOW

The opinion of the Appellate Court appears in the Appendix, infra. It has been published in People v. Golz, 53 Ill App 3d 654; 368 NE 2d 1069. The Supreme Court of Illinois denied Leave to Appeal, No. 50210, not yet published. (infra, p. 23)

JURISDICTION

The order of the Supreme Court of Illinois was entered on January 26, 1978. Jurisdiction of the Court is invoked pursuant to 28 USCA 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State after indicting the Petitioner for burglary, simultaneously

charging him with violation of an existing probation based upon that indictment, can convict him of that burglary in a revocation hearing, by a preponderance of the evidence and sentence him to the penitentiary on the probationary offense, within the constitutional protection of due process concepts of fairness. The outcome of the burglary trial, if any, is then irrelevant.

2. Whether the unfairness of the procedure, so expressed by the Appellate Court, and followed here, is solely the responsibility of the legislature to eliminate that unfairness; or, whether the fair concepts of due process are also a judicial concern.

STATEMENT OF THE CASE

The Petitioner pleaded guilty to forgery on May 23, 1974. (R C5) He was placed on

probation for two years, (R. C17) in a work release program. (R. C25-27) One year later, on June 2, 1975, the People petitioned to revoke his probation because he had committed a burglary. (R. C29) The People also charged him with the burglary, and simultaneously, with theft of goods in excess of $150.00. (R. C27-50)

Despite the Petitioner's motion in the trial court to subordinate the revocation hearing to the trial on the criminal charges, the trial court denied the motion, (R. C54) and proceeded with the revocation hearing. At the hearing, the owner testified to the loss of a television set, a tape recorder and a pair of automobile speakers. (R. 10) He said he knew Petitioner, He did not know if the latter had ever been in his house. (R. 13)

The policeman who testified said there was

no evidence the house had been ransacked. (R. 45) Nor were there identifiable fingerprints. (id.) Thus, the entire connection of defendant with this offense was through the testimony of the estranged wife of a friend. (R. 49) Her story was that of an unindicted accomplice (E.40) and dedicated husband-informer. (R. 41)

The burglary and its non-productive purpose, she said, were as follows: On January 12, 1975, Petitioner came to her house and asked her to drive him from Crystal Lake (R. 23) to Woodstock. (R. 17) He told her he was"supposed to pick up some money or something" from someone who had "ripped him and [her husbsnd] off." (R. 18) She drove to a trucking company lot (R. 19) He told her to wait he would have to break in. (R. 20) In 20 minutes Petitioner returned with a television set, tepe deck and speakers. (R.21)

One month later, Petitioner and her husband took the property to her friend's house. (R.23-24)

She and the friend, sometime later, abandoned it by a railroad track. (R. 25) Cross-examination centered upon her turbulent domestic life and her husband's infidelity. (R. 31-35)

The defendant testified. He denied the Woodstock story. (R 46) He denied the burglary and the theft. (R 47) He recounted her hostility toward him, because of her husband. (R. 48-58) The Court found Petitioner guilty. (R 58) It then denied his motion to delay a final order, until after the trial on the criminal charges, (R. C64-65) and sentenced him on the forgery to a term of two to six years in the penitentiary. (R. C76) It is from that order that an appeal was taken to the Appellate Court. (R. C80) It is from the Appellate Court's affirmance, (53 Ill App 3d 654) and the Illinois Supreme Court's refusal to review it, that this Petition is filed.

REASONS FOR GRANTING THE WRIT

I

IT IS A DENIAL OF DUE PROCESS OF LAW, BECAUSE OF ITS FUNDAMENTAL UNFAIRNESS, TO TRY A PERSON FOR VIOLATION OF PROBATION FOR THE COMMISSION OF A LATER OFFENSE, TO REVOKE PROBATION AND SENTENCE THAT PERSON TO THE PENITENTIARY ON THE PROBATIONARY OFFENSE, BEFORE A TRIAL ON THE INDICTMENT FOR THE LATER OFFENSE.

1. Quantum of Proof; Fairness.

The Petitioner here has been sentenced to the penitentiary for a term of two (2) years to six (6) years, (R. C76) nominally, and patently, for forgery. (id.) He has, in fact, been tried and convicted of burglary by a preponderance of the evidence. The device by which this conviction was obtained by the minimum quantum of proof, was by revocation of probation. The charge of violation of probation is a civil proceeding and the quantum of proof required is a preponderance. People v. Crowell, 53 Ill. 2d 447, 451; Ill. Rev. Stats. 1974, Ch. 38, Par 117-3 (c); now, Par.

1005-6-4(c). Here, the Petitioner was charged with a burglary, (R. 58) and promptly sentenced. (R 76) But, not on the indictment for burglary.

Petitioner made every effort to defer the trial of the burglary in the revocation hearing until the charge in the indictment had been tried. (R C54) The effort was unsuccessful. (id.) The People, therefore, had one and only one ground upon which to revoke this Petitioner's probation; guilty of burglary. No other conditions of probation were cited, tried or were evident. The revocation of this Petitoner's probation turned solely upon the conviction of burglary.

Having committed itself to a course of action, intending to punish defendant by alternative, and successive, attacks, the People were faced with the reality of collateral estoppel. If Petitioner was acquitted on the trial of the indictment, "relitigation between the same parties of issues actually determined" there,

would have prevented a revocation hearing, by a plea of "Collateral Lstoppel." Ashe v. Swenson, 397 US 436, 442; People v. Grayson, 58 Ill. 2d 260, 265.

> "Once the ultimate and only disputed fact of [burglary] had been determined by a final and valid judgment, the State could not constitutionally hale defendant before a new court in a criminal prodeeding or a probation revocation prodeeding and litigate that issue again." (Grayson, at 265)

The People created that dilemma for itself. It resolved it, by unconstitutionally trying the Petitioner for burglary in a Civil Proceeding. The converse of this, of course, does not hold true. People v. Warne, 39 Ill App 3d 894, 897. Conviction of the second offense is ground for revocation.

This Court has condemned the device of convicting a person for a crime in a civil proceeding as unconstitutional. (In re Winship, 397 US 358) There, a juvenile was adjudged a

delinquent and sentenced in a civil proceeding by the statutory quantum of proof, a preponderance of the evidence. (397 US at 359-360) This court reversed and expressly held:

> "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (In re Winship, at 364.)

So, here, the civil proceeding of a revocation hearing could not be used constitutionally to convict Petitioner of burglary by a preponderance of the evidence. But, that is what the trial did here, with highest court approval. It did so on the basis of the statutory quantum of a preponderance of the evidence. (Ill. Rev. Stats. Ch. 38, Par 1005-6-4(c))

The Appellate Court below affirmed the sentence and proceedings in the trial court on the basis of "administrative discretion." (53 Ill. App. 3d at 658-59) The Petitioner's

position here and below recognizes the broad latitutde of tactics permitted a prosecutor, augmented by his ingenuity. But, that latitude and ingenuity have limits. One limit is that having selected the procedure, he is bound by it, especially where notice and specificity are constitutionally required. Gagnon v. Scarpelli, 411 US 778, 786.

Here, the prosecutor exercised his discretion and charged this Petitioner with the crime of burglary, and notified him of the proposed violation of his probation in the commission of that crime. (53 Ill App 3d at 656) The prosecutor now was committed to the tactics and procedures he had adopted. If the Petitioner had been convicted of burglary, that conviction was grounds for revoking his probation. But, conviction of the burglary was the postulate. Until the People had convicted the Petitioner on the indictment, it could not

proceed to revoke his probation. This is the meaning of Morrissey v. Brewer, 408 US 471, and the blue print for due process of those previously convicted and conditionally free. (at 485 and 489) And, a potpourri of civil and criminal proceedings, of quanta of proofs indigenous to each, cannot obscure that conviction for burglary and resulting imprisonment must be by evidence convincing "beyond a reasonable doubt." In re Winship, 389 US at 359; Grayson, 58 Ill. 2d at 264.

2. Judicial Responsibility

The commingling of the charge of indictable conduct and the revocation of probation, for the same underlying conduct has been descried in the Illinois Courts. People v. Whitt, 16 Ill. App. 3d 824, 828 (concurring opinion); People v. Warne, 39 Ill App 3d 894. However, in Warne, the Court absolved

itself of responsibility for the shortcoming of "fairness" of the People's jumbled procedures by bequeathing it to the legislature; "**the resolution of this question [is] a matter of legislative policy." 39 Ill App 3d at 898.

It is not. the issue here is due process. "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 US 133, 136. "It is 'the law of th land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal." In re Oliver, 333 US 257,278. Moreover, the Illinois Supreme Court has recognized its responsibility to adapt judicial doctrine to the needs of justice in other areas. "The doctrine of school district immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider

we have not only the power, but the duty, to abolish that immunity." Molitor v. Kaneland School District, 18 Ill 2d 11, 25.

So, in this case the courts have the power--and the duty--to order that revocation of probation for a specific offense charged shall proceed only after conviction for that offense.

Respectfully submitted,

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APPENDIX

APPELLATE COURT OPINION

Reproduced

SUPREME COURT ORDER

Reproduced

76-172

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

-vs-

GREGORY GOLZ,

Defendant-Appellant.

MR. JUSTICE NASH delivered the opinion of the court:

Gregory Golz, defendant, appeals from a judgment of the Circuit Court of McHenry County revoking his probation and sentencing him to two to six years imprisonment.

Defendant was sentenced to probation in July 1974 after he entered a plea of guilty to the offense of forgery, and on June 2, 1975, the State filed a petition to revoke his probation alleging that he had violated its conditions by the commission of a burglary. Defendant's motion to continue the hearing of the petition to revoke probation until after trial of the criminal charge of burglary, upon which the petition to revoke probation was also based, was denied by the trial court. After the revocation hearing the court found defendant had violated his probation as described and sentence was imposed.

The only issue presented for review is

whether defendant was denied the equal protection of the laws guaranteed by Article I, section 2 of the Illinois Constitution of 1970 and the fourteenth amendment to the United States Constitution. He contends the trial court did so when his request was denied that he be prosecuted first for the substantive offense of burglary, with the State's burden of proof beyond a reasonable doubt, and was instead prosecuted first on the petition to revoke his probation for violation of its terms by the commission of the burglary, with the burden of proof then being by only a preponderance of the evidence. Had he been first acquitted of burglary if tried under the greater burden of proof, defendant contends, the State would have been precluded from trying him for that burglary on the petition to revoke his probation and, therefore the State's arbitrary exercise of discretion to try him first, as it did, on the probation violation with its lesser burden of proof results in the denial of equal protection to probationers, such as himself, enjoyed by other probationers when the State chooses to prosecute first on the substantive charge. We find defendant's argument to be without merit.

Defendant relies upon People v. Grayson, (1974), 319 NE 2d, cert. denied (1975), 421 U. S. 994, 44 L. Ed. 2d 484, 95 S. Ct. 2001, where the court held that the doctrine of collateral estoppel precluded revocation of a defendant's probation after his acquittal at trial of the same substantive criminal offense upon which the probation revocation petition was based. The principal was limited in Grayson to application in those circumstances where the proof of the offense alleged as a violation of a condition of probation would necessarily require a finding inconsistent with

a finding of ultimate fact resolved favorably to defendant in the first trial. (See also People v. Warne (1976), 39 Ill App 3d 894, 350 NE 2d 836. While reaffirming its holding in People v. Crowell (1973) 53 Ill. 2d 447, 292 NE 2d 721, that the revocation of a sentence of probation was properly determined upon a finding of a violation of the conditions of probation by a preponderance of the evidence, the court in Grayson found that the difference in the burden of proof necessary for a conviction of a substantive criminal offense and a finding of a violation of probation could not properly be utilized to relitigate an issue common to both proceedings. (58 Ill. 2d at 265, 319 NE 2d 43,45.) Defendant's understanding that he might not be tried at all for the alleged probation violation if first tried and acquitted of the common substantive offense of burglary is correct but does not in itself establish that an equal protection violation has occurred.

The fourteenth amendment prohibits discrimination between classifications of persons who are similarly situated, created through state action, where such classifications are unrelated to the public purpose sought to be attained or which, although reasonably designed to promote the public interest, have no reasonable basis and are therefore arbitrary. (City of Chicago v. Vokes, (1963) 28 Ill. 2d 475,479, 193 NE 2d 40, 44, appeal dismissed (1964), 377 U.S. 124, 12 L. ed. 2d 174, 84 S. Ct.1141) "Unless the classification constitutes an infringement of a constitutionally protected interest or is inherently suspect all that is required to sustain it is that it have some rational and reasonable basis. [Citations]"

People v. Sherman (1974), 57 Ill. 2d 1, 4, 309 NE 2d 562, 564; see Brown v. Board of Education (N.D. Ill. 1974), 386 F. Supp. 110.

Much of defendant's argument has been heretofore considered in People v. Huff (1976), 44 Ill. App. 3d 273, 357 NE 2d 1380, where it was held that no denial of equal protection arises where a probationer is tried first for a violation of the conditions of his probation rather than for the new substantive criminal offense. The court based its decision on the rational differences between a criminal trial and a prosecution of revoke probation.

> "A probation revocation hearing is qualitatively different from a criminal trial and not every right in a criminal trial is extended to probation hearings. [Citation]*** The probationer whose probation is being revoked is merely being resentenced because of his failure to comply with the terms of the probation order***. Since all probation proceedings are governed by the same standard of proof, we deem defendant's complaint to be without merit. [Citation] 44 Ill. App. 3d at 276-77, 357 NE 2d 1380, 1383.

Defendant argues further, however, that equal protection is also denied to him because the State is allowed the "unbridled discretion" to arbitrarily choose between trying a probationer first on the substantive charge or first on the petition to revoke probation.

It is clear that each probationer alleged to have committed a further criminal offense could be prosecuted in one of several ways. Each of them could be tried first on the petition to revoke probation, then on the

substantive criminal offense, or first on the substantive criminal offense and then on the petition to revoke probation. Each could also be tried on only the petition to revoke probation or on only the substantive criminal offense. In addition, the State's Attorney may in the exercise of his discretion choose not to prosecute at all. Each probationer accused of a subsequent criminal offense, therefore, is at the discretion of the State ultimately placed in one of these five classifications; that fact alone does not raise an equal protection issue.

Prosecutors have traditionally been afforded a broad range of discretion within which to perform their public duties and their authority to select the offense to be prosecuted and the method of doing so is a necessary and proper function of that office in the criminal justice system. The State's Attorney is an elected representative of the people; he has the responsibility for evaluating the evidence and other pertinent factors to determine what offense, if any, can and should properly be charged (People v. McCullough (1974), 57 Ill. 2d 440, 444, 313 NE 2d 462, 464, appeal dismissed, 419 U.S. 1042, 42 L. Ed. 2d 637, 95 S. Ct. 614; People v. Rhodes (1967), 38 Ill. 2d 389, 396, 231 NE 2d 400, 403) and what penalties should be sought (People v. Graham (1975), 25 Ill. App. 3d 853, 857, 323 NE 2d 441, 444).

> "Myriad factors can enter into the prosecutor's decision. Two persons may have commited what is precicely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges. On the contrary, he is expected to exercise discretion and common sense***" Newman v. United States (DC Cir. 1967), 382 F 2d 479, 481-82)

It is not a denial of equal protection to refuse to extend the same offer of a negotiated plea to two co-defendants (Newman v. United States (D. C. Cir.1967), 382 F. 2d 479); nor is equal protection of the laws denied where some defendandt are prosecuted for a crime while their accomplices are not (People v. Tillman(1972), 4 Ill. App. 3d 910, 282 NE 2d 231) Where the State is permitted to choose whether to prosecute under either of two statutes requiring substantially similar proof but affording considerably different sentencing alternatives, equal protection of the law is not violated. (People v. Brooks (1976), 65 Ill. 2d 343, 357 NE 2d 1169; People v. McCullough(1976), 57 Ill. 2d 440, 313 NE 2d 462, appeal dismissed,419 U.S. 1043, 42 L. Ed2d 637, 95 S. Ct. 614; People v. Yocum (1975), 31 Ill. 3d 586, 335 NE 2d 183.) The discretion afforded a prosecutor is necessary because the legislature cannot fairly describe every possible set of circumstances which might present themselves to a prosecutor in each case and pre-determine his course of action by statute; decisions must be made by those who administer the criminal laws in determining the method and direction of the prosecution.

Defendant would have us find that the doctrine that all persons are entitled to the equal protection of the laws requires the prosecutor to treat each probationer alike without regard to the real and rational differences that exist between individuals charged with the commission of an offense and the manner and means they are alleged so to have commited it. All offenders and their past and present conduct are patently not alike and justice would not be served by removing the prosecutorial discretion which can give consideration to those differences. Such discretion is not unbridled but must be exercised with due regard to the law.

In the instant case defendant has presented no evidence in support of his contention he has been discriminated against. In the absence of such evidence, this court may not determine that the prosecutor has exercised his lawful discretion arbitrarily against defendant or that he applied no impermissible standard by basing his decision on a characteristic of this defendant, such as race, religion or nationality, to defendant's disadvantage. Impermissible prosecutorial selectivity may be shown, for example, where a defendant is intentionally chosen from among other violators for prosecution for a draft card violation because of his membership in a group unpopular with the government. (United States v. Falk (7th Cir. 1973), 479 F. 2d 616; accord, Edelman v. California (1953), 344 U.S. 357, 97 L. Ed. 387, 73 S. Ct. 293 (dictum).) In Yick Wo v. Hopkins (1886), 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064, the United States Supreme Court found equal protection was violated where a county board, having an unlimited discretion to grant operating licenses to laundries located in wooden buildings did, in fact, grant those licenses only to laundries operated by Caucasians and denied them to those operated by Chinese. While Yick Wo involved an administrative decision and not prosecution for a crime, its principles have been extended to the criminal sphere. In Oyler v. Boles (1962), 368 US 448, 7 L. Ed. 2s 446, 82 S. Ct. 501, the court recognized that selective enforcement of the law, in practice, might well result in a denial of equal protection. The court required, however, that there be a showing not only of selectivity, but the application of an unjustifiable or impermissible standard in making that selection. 368 US at 456, 7 L. Ed. 2d 446, 453,

82 S. Ct. 501, 506; see also State v. Stearer (1973), 37 Ohio App. 2d 51, 306 NE 2d 425.

Defendant Golz has made no showing either of improper selectivity in his prosecution or of the use of an impermissible standard by the State in making its decision to prosecute him first on the petition to revoke probation. In neither the procedure employed by the State in prosecuting him nor its administration has he demonstrated any violation of his right to equal protection of the laws.

For these reasons we affirm the judgment of the Circuit Court of McHenry County.

Affirmed.

RECHENMACHER, P. J. and BOYLE, J. concur.

50210

STATE OF ILLINOIS
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January 26, 1978

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No. 50210 - People State of Illinois, respondent, vs. Gregory Golz, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Cecil A. Woods

Clerk of the Supreme Court

BEST COPY AVAILABLE